

August 7, 2014

Betty Ann Downing, Esq.
California Political Law, Inc.
3605 Long Beach Blvd., Suite 426
Long Beach, CA 90807

Re: Your Request for Advice
Our File No. A-14-137

Dear Ms. Downing:

This letter responds to your request for advice, on behalf of former Assembly Member Jose Solorio, regarding the campaign provisions of the Political Reform Act (the “Act”).¹ This letter should not be construed as assistance on any conduct that may have already taken place. (See Regulation 18329(b)(8)(A).) Additionally, this letter is based on the facts presented. The Fair Political Practices Commission (the “Commission”) does not act as a finder of fact when it renders assistance. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

QUESTION

May the committee Solorio for Assembly 2010, which was previously terminated, transfer funds received as a settlement with First California Bank, for alleged negligence arising out of the misappropriation of funds by former campaign treasurer Durkee and Associates, to Solorio for Senate 2014 or are the funds subject to surplus funds restrictions?

CONCLUSION

Because the funds were not under the control of the committee Solorio for Assembly 2010 at the time former Assembly Member Solorio left office, the surplus fund restrictions do not apply to the settlement funds, and the funds may be transferred to Solorio for Senate 2014 pursuant to the attribution rules of Section 85306 and Regulation 18536.

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

FACTS

You represent former Assembly Member Jose Solorio and his controlled committees. Currently, Mr. Solorio is a candidate for Senate. Mr. Solorio's committees were previously handled by professional campaign treasurers Durkee & Associates, and had a significant amount of campaign funds embezzled by the company.

As a result of the embezzlement of funds, Mr. Solorio's committees were parties to litigation against First California Bank for negligence. As a result of this litigation, a settlement has been reached with the bank, and Mr. Solorio's committees will be entitled to settlement funds. At issue, a significant amount of funds will be paid to Solorio for Assembly 2010. However, this committee was terminated after Mr. Solorio left the Assembly in 2012, and remaining funds were transferred to his Solorio for Senate 2014 account prior to his departure. At this time, Mr. Solorio would like to transfer the funds being paid to Solorio for Assembly 2010 by the bank to Solorio for Senate 2014. However, because he has already left office, you are concerned that the funds are now "surplus" and ineligible for transfer to the committee.

ANALYSIS

Section 89519 specifies when campaign funds controlled by a candidate or elected officer become surplus, thereby limiting the use of the funds to specified purposes. Subdivision (a) states:

"Upon leaving any elected office, or at the end of the postelection reporting period following the defeat of a candidate for elective office, whichever occurs last, campaign funds raised after January 1, 1989, under the control of the former candidate or elected officer shall be considered surplus campaign funds and shall be disclosed pursuant to Chapter 4 (commencing with Section 84100)."

Subdivision (b) of Section 89519 limits the use of surplus funds to six enumerated purposes, which include:

"(1) The payment of outstanding campaign debts or elected officer's expenses.

"(2) The repayment of contributions.

"(3) Donations to any bona fide charitable, educational, civic, religious, or similar tax-exempt, nonprofit organization, where no substantial part of the proceeds will have a material financial effect on the former candidate or elected officer, any member of his or her immediate family, or his or her campaign treasurer.

“(4) Contributions to a political party committee, provided the campaign funds are not used to support or oppose candidates for elective office. However, the campaign funds may be used by a political party committee to conduct partisan voter registration, partisan get-out-the-vote activities, and slate mailers as that term is defined in Section 82048.3.

“(5) Contributions to support or oppose any candidate for federal office, any candidate for elective office in a state other than California, or any ballot measure.

“(6) The payment for professional services reasonably required by the committee to assist in the performance of its administrative functions, including payment for attorney’s fees for litigation which arises directly out of a candidate’s or elected officer’s activities, duties, or status as a candidate or elected officer, including, but not limited to, an action to enjoin defamation, defense of an action brought of a violation of state or local campaign, disclosure, or election laws, and an action from an election contest or recount.”

Most pertinent to your request, subdivision (b)(5), contains language prohibiting the use of contributions to support or oppose a specific candidate for elective office in California. Commission staff has consistently advised that this language prohibits a candidate from using surplus campaign funds left over from one state or local campaign to fund that same candidate’s later campaign for another state or local office in California. (See *In re Pirayou* (2006) 19 FPPC Ops. 1.)

Regulation 18951 further states, in pertinent part:

“(a) Campaign funds raised after January 1, 1989, under the control of a candidate or elected officer shall be considered surplus campaign funds on the following dates:

“(1) Incumbent Candidates: The date on which an incumbent candidate leaves any elective office for which the campaign funds were raised, or, if the candidate is defeated for reelection, the end of the postelection reporting period following his or her defeat, whichever is later. An incumbent candidate who wishes to use funds for a future election must transfer those funds to a new committee for a future election no later than this date.”

As interpreted by Regulation 18951(a)(1), Section 89519 generally requires an incumbent candidate who wishes to transfer campaign funds for a future election to transfer the funds no later than the date on which the candidate leaves office. Nonetheless, Regulation 18951 does not address the clear statutory requirement that funds are considered “surplus” only to the extent that the funds are “under the control” of the incumbent candidate. Because control of campaign

funds does not come into question in most instances, we have not previously had the occasion to consider the element of “control” in interpreting Section 89519.

For Mr. Solorio and other committees affected by the unprecedented misappropriation of campaign funds by Durkee and Associates, all campaign funds deposited with First California Bank were turned over by the bank to the Los Angeles County Superior Court in an interpleader action asking the court to allocate the balance of the funds remaining in the accounts. As a result of the bank’s action, committees lost all access to campaign funds until the resolution of the interpleader action. Moreover, the negligence suit against the First California Bank was initiated as a remedy for the alleged failure of the bank to identify or question suspicious transactions by Durkee and Associates, which resulted in a substantial loss of campaign funds for the affected committees. In these instances, the committees affected by the Durkee misappropriations had no control over the funds in question until recovered by the committee. Under the express language of Section 89519, an incumbent candidate’s unrecovered funds did not become surplus on the date the candidate left office by operation of Regulation 18951. Accordingly, upon the recovery of funds, Section 89519 does not support a prohibition against a candidate who wished to transfer the funds for use in a future election, and Mr. Solorio may transfer those funds recovered by the Solorio for Assembly 2010 to Solorio for Senate 2014.

Notwithstanding the conclusion that Mr. Solorio may transfer funds recovered to Solorio for Senate 2014, we must also determine whether the funds must be attributed to previous donors in making the transfer. Section 85306 permits candidates to “transfer campaign funds from one controlled committee to a controlled committee for elective state office of the same candidate” requiring candidates to attribute transferred contributions using either a LIFO or FIFO accounting method. Funds may not be transferred if the funds attributed to a specific contributor exceed the contribution limits of Section 85301 or 85302 when aggregated with all other transfers attributed to, and contributions from, the same contributor.

Regulation 18536 outlines the Commission’s rules pertaining to the transferring and attribution of contributions and provides in pertinent part:

“(a) A committee transferring funds must designate in its record at the time of its first transfer whether it elects the ‘first in, first out’ or a ‘last in, first out’ method of accounting for the current and future transfers. That designation is irrevocable.

[¶] ... [¶]

“(3) Campaign funds shall be attributed to contributors in the lesser of the following amount:

“(A) The actual amount of the original contribution from the person to whom the campaign funds are being attributed;

“(B) The applicable contribution limit under Government Code [S]ection 85301 or 85302; or

“(C) The amount of campaign funds the committee is seeking to transfer that has not yet been attributed.”

Under the facts presented, the settlement has been reached to remedy alleged negligence by First California Bank, which resulted in the misappropriation of campaign funds by Durkee and Associates. Because the settlement arises from campaign funds lost by the committee, the settlement funds should be treated as recovered campaign funds and must be attributed to the previous donors in the same manner as the campaign funds they are intended to replace. This ensures the funds recovered do not exceed applicable contribution limits from any particular source. Accordingly, the transfer is subject to attribution rules under Section 85306 and Regulation 18536.²

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: Brian G. Lau
Counsel, Legal Division

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² While a previously terminated committee must generally reopen to accept a refund or similar payment under Regulation 18404.1(g), in light of the unique circumstances involving the misappropriation of funds by Durkee and Associates, further reporting by the terminated committee is wholly unnecessary when the committee has already reported the misappropriated funds. For Mr. Solorio’s purposes, the settlement funds should be deposited directly into Solorio for Senate 2014 as soon as they are received. Additionally, the funds should be reported as funds transferred from Solorio for Assembly 2010 and properly attributed.